

Power of Attorney

Powers of attorney and advanced care planning: Wishes and directives

By Susannah Roth and Margaret O'Sullivan



Susannah Roth



Margaret O'Sullivan

(September 4, 2019, 8:57 AM EDT) -- Our previous articles have provided an overview of legal issues relating to powers of attorney. This seventh article in our series explores the issues of personal care decisions and advance wishes and directives in greater detail.

Decisions regarding personal care matters, other than health care, are governed by the *Substitute Decisions Act, 1992, Ontario (SDA)*. Under the SDA, you may plan for personal care matters relating to your nutrition, shelter, clothing, hygiene and safety. There are very few restrictions on the types of wishes you may express. However, you should avoid expressing wishes that may be impractical, such as those that are costly in relation to the size of your estate or difficult to implement.

Your attorney for personal care or other substitute decision maker is not required to follow wishes regarding personal care matters that are impossible to carry out, but must follow wishes regarding health care decisions unless the Consent and Capacity Board approves a departure from such wishes. Wishes and directives regarding health care decisions will be discussed in depth in a future article.

Your wishes are important because they guide your attorney for personal care when you are no longer capable of making personal care decisions on your own. If your wishes are unknown, your attorney must act in accordance with your best interests under the SDA if you are subject to Ontario law.

Notwithstanding their critical importance, it seems that letters of wishes tend to be underutilized. Where they are used, they are often limited in scope to deal with end-of-life matters only, and not as often with a variety of non-health care matters. These matters are critical to our everyday lives and should be considered in the formulation of any advance care plan. The following questions provide some guidance as to matters you may wish to consider and include in your unique letter of wishes:

- Do you prefer to remain in your home setting for as long as reasonably possible, as opposed to institutional care? In order to remain in your home, do you want to receive nursing and medical care in your home, such as may be provided by live-in or live-out caregivers?
- Do you have an accustomed lifestyle that you wish to be adhered to as much as possible?
- Under what circumstances would you want to reside in an institutional setting? Do you have a preference as to which ones? Do you have a geographical preference, such as one in your existing residential area or would you prefer to reside in one closer to your family or friends? What special services should be provided?
- Do you require special clothing, footwear or apparel? Do you have special hygiene or

- personal grooming requirements or preferences, including as to cost and service providers?
- Do you have special transportation requirements or preferences?
 - Do you wish to pursue any special activities, including outings?
 - Do you have any dietary preferences or restrictions?
 - Do you have any religious beliefs and strictures which should be followed or given precedence in your care?

If you have preferences with respect to any of the above matters, it is a good idea to express your wishes in a detailed manner, as opposed to relying on general statements.

As discussed in greater detail below, your substitute decision maker is not required to follow your wishes if they are not "applicable in the circumstances." This may be the case where your circumstances have changed since you expressed your wishes, or where your wishes are vague, unclear or imprecise.

Take, for example, the following wish expressed by a person while young and healthy: "It is my wish that I remain living in my home until my death." It is likely this wish would be considered inapplicable if the person were to become totally dependent on others for his or her every need and required medical assistance that could not reasonably be provided in his or her home setting. It may also not be clear to your substitute decision maker if you would want the high cost of staying in your home to be paid for as long as possible regardless of the expense or if you would prefer not to deplete your assets in this manner.

Instead of expressing your wishes generally, they can be tailored to your unique personal circumstances and they should contemplate various scenarios. It is also important to update them as your circumstances change. These types of decisions are all very individual and often cannot be determined in the manner you would want without your input and guidance.

Our next article will explore issues regarding wishes and directives for health care matters in greater detail.

This is the seventh article in a series. Read part one: Powers of attorney and advanced care planning: Disability; part two: Powers of attorney and advanced care planning: Property; part three: Powers of attorney and advanced care planning: Revocation and alternatives; part four: Powers of attorney and advanced care planning: Personal care; part five: Powers of attorney and advanced care planning: Substitute decision making; and part six: Powers of attorney and advanced care planning: Health care consent.

Susannah Roth is a partner, and Margaret O'Sullivan is the managing partner at O'Sullivan Estate Lawyers.

Photo credit / stanciuc ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Richard Skinulis at Richard.Skinulis@lexisnexis.ca or call 437-828-6772.